1638-00176
88097219

Ford Motor Company
Office of the General Counsel
Direct Dial (313) 248-2352
Facsimile (313) 594-2921

Suite 728 - Parklane Towers East
One Parklane Boulevard
Dearborn, Michigan 48126-2493

September 29, 1995

Via Federal Express

Ms. Nancy Riveland - Har, H-7-4
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Fransciso, California 94105

Verdese Carter Park Site
Oakland, California

Dear Ms. Riveland:

Enclosed is Ford Motor Company's response to the United States Environmental Protection Agency's Request for Information on the Verdese Carter Park Site dated August 1, 1995.

If you have any questions, please call me at the above-referenced number or in my absence, you may call Elaine Black Mills, the attorney handling this matter, on (313) 594-0096.

Sincerely,

Cassandra I. Weaver
Legal Assistant

Enclosure

United States Environmental Protection Agency
Region IX

In the Matter of:	)	Ford Motor Company's
Verdese Carter Park Site	)	Response to Information
Oakland, California	)	Request

GENERAL OBJECTION

Ford Motor Company ("Ford") objects to this request on the grounds that it seeks to impose a continuing obligation to supplement Ford's response although no supplementation is required by CERCLA.

RESPONSE

This response is based upon the results of a reasonable search for information and documents relating to Ford Motor Company ("Ford") and the Verdese Carter Park Site, 9716 Sunnyside Street, Oakland, California.

This response is the corporate response of Ford and was assembled by authorized employees and counsel. Future correspondence in regard to this matter can be sent to:

Elaine Black Mills, Esq.
Ford Motor Company
Suite 728 - Parklane Towers East
One Parklane Boulevard
Dearborn, Michigan 48216-2493
(313) 594-0096

1. (a) In April 1961, Ford purchased certain assets of The Electric Autolite Company. Such acquisition did not include any facilites or properties in Verdese Carter Park, Oakland California. (See enclosed Agreement dated April 12, 1961.)

(b) Based upon information and belief (see enclosed case, Ford Motor Co. v. United States (1972)), The Electric Autolite Company did not sell all its assets to Ford, and The Electric Autolite Company changed the name of the business that it retained to Eltra Corp., which in 1962 began manufacturing spark plugs in Decatur, Alabama, under the brand name Prestolite.

2. See attached documents.

3. Ford has not located any information indicating that it ever operated at the Verdese Carter Park Site.

I, Thomas DeZure, am an Assistant Secretary of Ford Motor Company and sign the foregoing Response to the Request for Information in the matter of Verdese Carter Park Site, Oakland, California, for and on behalf of Ford Motor Company and am duly authorized to do so. Although the matters stated therein are not within my personal knowledge, the facts have been assembled by authorized employees and counsel of Ford Motor Company, and I am informed that they are true.

Signed this 29th day of September, 1995

FORD MOTOR COMPANY

Thomas DeZure
Assistant Secretary

Subscribed and sworn to before me
this 29th day of Sept., 1995
Marilyn J. Faulkner

/Conformed Copy/

AGREEMENT dated April 12, 1961 between THE ELECTRIC AUTOLITE COMPANY, an Ohio corporation (hereinafter called the Seller), and FORD MOTOR COMPANY, a Delaware corporation (hereinafter called the Buyer).

1. Sale and Purchase of Certain Assets. The Seller is selling to the Buyer, and the Buyer is purchasing from the Seller, at the purchase prices set forth in Section 2 hereof, by the delivery simultaneously herewith of bills of sale, deeds, assignments, endorsements and other instruments of transfer and conveyance, the following assets, properties and rights:

(a) All the tangible assets and properties of the Seller used in connection with the spark plug operations of the Seller located at Fostoria, Ohio, and the battery operations of the Seller located at Owosso, Michigan including, without limitation or exception, whether or not included in the lists referred to in the next to last paragraph of this Section, all land, land improvements (including railroad sidings, fences and interior streets), buildings and building equipment, machinery and equipment (including tools, dies, molds, furniture and fixtures and automotive equipment) and inventory, merchandise and materials (such tangible assets and properties being hereinafter called the Tangible Assets).

(b) All the patents, patent applications, licenses, inventions, discoveries, improvements, copyrights and similar technical data and property owned or held by the Seller throughout the world (including all agreements and the rights therein under which the Seller supplies technical assistance or licenses its patents and trade-marks) pertaining to spark plugs, batteries, and processes and equipment for their manufacture; except that the Seller reserves (i) all such patents, patent applications, licenses, inventions, discoveries, improvements, copyrights and similar technical data and property in Canada, Brazil and Venezuela (subject to a non-exclusive license thereunder to the Buyer and its subsidiaries in such countries), and (ii) a non-exclusive license thereunder for its use throughout the world, other than Canada, Brazil and Venezuela.

(c) The trade-mark and the trade name "AUTOLITE" (including, without limitation, all trade-marks and trade names associated therewith, such as "AL" and design, "Autolite Star", "Resistor", "Cavalier" and "Sta ful") and any variant thereof (all of such trade-marks and trade names and variants thereof being referred to herein as

"Autolite"), together with the good will pertaining thereto and all registrations and applications for registrations therefor; except that the Seller reserves such trade-marks and trade names for its exclusive use in Canada, Brazil and Venezuela, provided that devices bearing any such trade-mark, trade name or variant may be sold therein in vehicles made by the Buyer and its subsidiaries in other countries.

(d) All the business and good will of and pertaining to the Acquired Operations including, without limitation, all plans, manufacturing information and know-how, processing data, specifications and engineering drawings, designs, research data and other engineering information and materials owned by the Seller.

(e) All the agreements and purchase orders between the Seller and its suppliers in effect at the date hereof entered into in the ordinary course of business and necessary for the normal conduct of the Acquired Operations, to the extent that performance thereunder has not been completed by such suppliers as of the date hereof.

(f) All the agreements between the Seller and tire companies, oil companies, national accounts, automotive and marine after market distributors and dealers, and all the unfilled portions of all orders from such companies, accounts, distributors and dealers, in effect on the date hereof entered into in the ordinary course of business and pertaining to the Acquired Operations, including, without limitation, agreements with battery distributors, battery jobbers, central distributors, central service stations, central service warehouses, service distributors, contractor accounts, dealers, distribution accounts, fleet owners, warehouse wire and cable distributors and warehouse spark plug distributors.

(g) All the prepaid expenses (excluding insurance expenses) pertaining to the Acquired Operations and to the other assets, properties and rights being sold simultaneously herewith.

(h) All the leases or agreements under which the Seller is lessor or lessee, in effect on the date hereof entered into in the ordinary course of business and pertaining to the Acquired Operations.

(i) All the advertising and promotional agreements or arrangements to which the Seller is a party in effect on the date hereof entered into in the ordinary course of business and pertaining to the Acquired Operations.

(j) All the other agreements (other than agreements relating to employees and employee benefit plans) to which the Seller is a party in effect on the date hereof entered into in the ordinary course of business and pertaining to the Acquired Operations.

(k) All the Seller's rights against manufacturers and suppliers (including, without limitation, all rights in connection with such manufacturers' and suppliers' warranties and representations) with respect to raw materials, parts and any other materials and merchandise purchased by the Seller from such manufacturers and suppliers prior to the date hereof and being sold to the Buyer simultaneously herewith.

(l) All the customer lists, books and records pertaining to the Acquired Operations. Such books and records shall not include those relating to the Seller's general corporate affairs or to any properties of the Seller not being transferred to the Buyer but, in so far as any books and records

so excluded shall relate to the Acquired Operations or to the properties, assets or rights being transferred to the Buyer, the Buyer shall have the right to examine the same at all reasonable times and to make copies or abstracts thereof; and in so far as any of the books and records being transferred to the Buyer shall, in the Seller's opinion, be material in connection with any tax or business problems or purposes of the Seller, the Seller shall have the right to examine the same at all reasonable times and to make copies or abstracts thereof.

To the extent that the assignment of any of the above patents, patent applications, licenses, trade-marks, trade names, orders, agreements or leases shall require the consent of the other parties thereto, this Agreement shall not constitute an assignment or an agreement to assign the same if such action would constitute a breach thereof. The Seller will use its best efforts to obtain the consent of the other parties to the assignment thereof to the Buyer. If such consent is not obtained the Seller will cooperate with the Buyer in any reasonable arrangement designed to provide for the Buyer the benefits thereunder.

The sale of the Tangible Assets and all the other assets, properties and rights referred to in this Section (such Tangible Assets and such other assets, properties and rights

being hereinafter sometimes called the Acquired Properties) is made free and clear of all liabilities, obligations, liens and encumbrances, except any imperfection of title, lien or encumbrance of the type specified in Section 5(b) hereof and except those liabilities and obligations which are hereby assumed by the Buyer as set forth in Sections 3 and 10 hereof. The Seller shall pay all transfer, sale, documentary or other taxes in connection with the sale of the Acquired Properties. The Buyer shall furnish the Seller with appropriate resale certificates for establishing exemptions from the Michigan and Ohio sales taxes and appropriate certificates for establishing exemptions from the Federal excise tax.

Nothing in this Agreement or the instruments of transfer referred to herein shall be construed as precluding the Seller from manufacturing and selling any product anywhere under a trade-mark or trade name other than those transferred as recited in paragraph (c) of this Section.

The Seller has delivered to the Buyer lists and brief descriptions of the items referred to in paragraphs (a), (b), (c), (e), (f), (g), (h), (i) and (j) (except for the exclusion of agreements entered into in the ordinary course of business for the purchase or sale of materials and products extending for a period of not more than one year from the date hereof and involving

not more than $5,000 each) of this Section including, without limitation, all liabilities and obligations of the Seller in respect thereof, and represents and warrants that such lists and descriptions are substantially correct and complete as of the date hereof.

The Seller hereby agrees that, from time to time, at the Buyer's request and without further consideration, the Seller will execute and deliver such other instruments of conveyance and transfer and take such other action as the Buyer reasonably may require more effectively to convey, transfer to and vest in the Buyer, and to put the Buyer in possession of, the Acquired Properties.

2. Purchase Prices.

(a) The purchase prices for the Acquired Properties are as follows, payable by the delivery to the Seller simultaneously herewith of a certified or bank cashier's check to the Seller or its order in an amount equal to the aggregate of such prices:

Acquired Properties	Purchase Prices
Land	$ 80,000
Land Improvements, including railroad sidings, fences, and interior streets	$ 200,000
Buildings and Building Equipment	$ 3,000,000

Acquired Properties	Purchase Prices
Machinery and Equipment, including tools, dies, molds, furniture and fixtures and automotive equipment	$18,103,000
Inventory	$ 3,896,000*
Prepaid Expenses	$ 488,000*
License Agreements, Trade Marks and Patents	$ 250,000
Goodwill	$ 2,000,000

(b) The Seller hereby agrees that it will cause Messrs. Touche, Ross, Bailey & Smart, the Seller's accountants, on or before May 31, 1961, to prepare and deliver to the Buyer and the Seller, respectively, a certificate, concurred in by Messrs. Lybrand, Ross Bros. & Montgomery, the Buyer's accountants (said two firms of accountants being hereinafter together called the Accountants), as to (i) the amount (at cost -- principally first-in first-out method -- or market, whichever is lower), as of the close of business on the date hereof of the inventory included in the Acquired Properties, and (ii) the amount as of the close of business on the date hereof of the prepaid expenses included in the Acquired Properties, the amounts of such inventory and prepaid expenses to be determined in accordance with generally accepted accounting principles applied on a basis consistent

* Subject to adjustment as provided in paragraph (b) of this Section.

with those applied in the financial statements of the Seller referred to in Section 5(h) of this Agreement. In the event that said certificate shall show an inventory amount in excess of or less than the purchase price thereof as set forth in paragraph (a) of this Section, or shall show a prepaid expenses amount in excess of or less than the purchase price thereof as set forth in paragraph (a) of this Section, the Buyer shall promptly pay to the Seller the amount of any net excess owing, or the Seller shall promptly pay to the Buyer the amount of any net deficiency owing, as the case may be, such payment being by way of adjustment of the purchase prices for the inventory and prepaid expenses as set forth in paragraph (a) of this Section.

If the Accountants are unable to agree on such adjustments on or before May 31, 1961, such matter shall be referred to a firm of independent public accountants of recognized standing selected by the Accountants for its prompt determination.

The determination of such adjustments in the manner prescribed in this paragraph (b) shall be conclusive and binding upon the parties hereto and their successors and assigns.

3. Assumption of Liabilities and Obligations by the Buyer. The Buyer hereby assumes all the following liabilities and obligations of the Seller:

(a) All the Seller's obligations under agreements with and purchase orders issued to suppliers referred to in Section 1(e) hereof, provided that such obligations are stated in the agreements or purchase orders, either specifically or by implication, and are to be performed subsequent to the date hereof in exchange for goods to be delivered or services to be performed by such suppliers subsequent to the date hereof.

(b) All the Seller's obligations under agreements and orders referred to in Section 1(f) hereof, provided that (i) such obligations are stated in such agreements or orders, either specifically or by implication, and are to be performed subsequent to the date hereof in exchange for benefits to be conferred or accruing subsequent to the date hereof, including obligations to grant merchandise credits or promotional awards to which distributors may become entitled subsequent to the date hereof in accordance with the terms and provisions of such agreements and orders then in effect consistent

with the type and terms of obligations in effect during 1960, and (ii) notwithstanding anything to the contrary implied by the foregoing, such obligations shall not include any with respect to the Seller's product warranties and adjustment policies except to the extent specified in paragraph (e) of this Section.

(c) All the Seller's obligations under the agreements and other items referred to in Sections 1(h) and 1(j), provided that such obligations are stated in such agreements and items, either specifically or by implication, and are to be performed subsequent to the date hereof in exchange for benefits to be conferred or accruing subsequent to the date hereof.

(d) All the Seller's obligations to be performed after the date hereof under the agreements and other items referred to in Section 1(i) or under the commitments in the amounts set forth in the list delivered to the Buyer pursuant to Section 1(i). The amounts which from January 1, 1961 to the date hereof the Seller in accordance with its regular classification of accounts has recorded as liabilities, and subsequently paid, for advertising and promotional expenses (excluding television and radio) shall, if not accepted by the Buyer, promptly be audited by the firms of accountants

named in paragraph 2(b) who shall render their joint certificate to the Seller and Buyer as to the total thereof. If the amount so certified plus the sum of $200,000 paid by the Seller to the Buyer concurrently herewith shall exceed or be less than $616,000 (which the parties have agreed represents the Seller's fair share of such obligation for said period), the Seller shall pay to the Buyer any such deficiency or the Buyer shall refund to the Seller any such excess, as the case may be.

(e) All the Seller's liabilities and obligations under the adjustment policies (but not product warranties) referred to in Section 7(a) hereof, provided that (i) the Buyer shall not assume any liability or obligation under such adjustment policies except as to products sold by the Seller under the "Autolite" brand name, (ii) the Buyer shall not assume any liability or obligation in connection with claims for property damage or personal injury, and (iii) the Seller shall reimburse the Buyer for all amounts allowed, credited, rebated, discounted or paid in cash or in kind by the Buyer in connection with the liabilities and obligations hereby assumed by the Buyer under such adjustment policies up to and including the sum of $200,000.

The Buyer does not assume any of the above-mentioned liabilities or obligations if such liability or obligation, or the agreement or other item to which it relates, is not described in the lists submitted to the Buyer by the Seller pursuant to Sections 1 or 7 hereof.

Except as specifically provided in this Section and in Section 10 hereof, the Buyer does not assume any liability or obligation of the Seller of any nature whatever, whether or not of a type which is or should be recorded on the books of the Seller, and whether or not arising or accruing prior or subsequent to the date hereof.

4. Indemnities.

(a) The Seller hereby indemnifies and holds harmless the Buyer from and against any and all loss, cost, liability and expense arising out of or in connection with any and all liabilities and obligations of the Seller not expressly assumed by the Buyer, and any and all liabilities and obligations of the Seller arising out of or resulting from the ownership of the Acquired Properties or the operation of the Acquired Operations prior to the date hereof, other than those liabilities and obligations assumed by the Buyer pursuant to Sections 3 and 10 hereof, and from all actions, suits, proceedings, demands, claims, assessments and judgments with respect to any of the foregoing.

(b) The Buyer hereby indemnifies and holds harmless the Seller from and against any and all loss, cost, liability and expense arising out of or in connection with any and all liabilities and obligations of the Seller assumed by the Buyer pursuant to Sections 3 and 10 hereof, and from all actions, suits, proceedings, demands, claims, assessments and judgments with respect to any of the foregoing.

5. Certain Representations and Warranties by the Seller.

The Seller hereby represents and warrants as follows:

(a) The Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Ohio and is entitled to carry on the Acquired Operations and to own the Acquired Properties as and in the places where the Acquired Operations are now conducted and the Acquired Properties are now owned or operated. The copies of the Seller's Articles of Incorporation and Code of Regulations, certified by an officer of the Seller, which have been delivered to the Buyer, are correct and complete as of the date hereof.

(b) The Seller has good and marketable title to all the Acquired Properties, real and personal, free and clear of all liens and encumbrances, except (i) liens for taxes and assessments not yet due and payable, and (ii) such imperfections of title and encumbrances, if any, as are not substantial in character, amount or extent, and do not materially detract from the value, or interfere with the present use, of the Acquired Properties subject thereto or affected thereby, or otherwise materially impair the Acquired Operations. The Seller has paid and will pay any and all federal income, manufacturers excise, withholding, federal insurance contributions act, federal unemployment and state unemployment taxes, license fees and other charges levied or imposed upon or in connection with the Acquired Operations or the Acquired Properties that are due and payable as of the date hereof, or that will become due and payable by reason of the operation of the Acquired Operations or the Acquired Properties by the Seller prior to the date hereof. The Seller has not received notice of any violation of any applicable zoning regulation, ordinance, or any other law, order, regulation or requirement relating to the Acquired Properties and, so far as known to the Seller, there is no such violation.

(c) The conduct of the Acquired Operations as now conducted, the use of the Acquired Properties as now used, and the products thereof do not infringe, so far as known to the Seller, any patent, trade-mark or trade name of another and the Seller has not received any notice of conflict with the asserted rights of others.

(d) There is no litigation, proceeding, governmental investigation or claim outstanding, pending, or so far as known to the Seller, threatened, against the Acquired Operations or the Acquired Properties, except for suits or claims of a character incident to the normal conduct of the Acquired Operations or the Acquired Properties and involving not more than $10,000 in the aggregate, except as contained in List 5(d).

(e) To the best of the knowledge, information and belief of its officers, the Seller has complied with all laws, regulations and orders applicable to the Acquired Operations and the Acquired Properties.

(f) The consummation of the transactions contemplated hereby will not, to the best of the Seller's knowledge, information and belief, result in any breach of, or constitute a default under, any agreement or other

instrument or obligation relating to the Acquired Operations or the Acquired Properties to which the Seller is a party or by which the Seller may be bound or affected, or result in the creation of any lien, charge or encumbrance upon any of the Acquired Operations or the Acquired Properties.

(g) The Seller as of the date hereof is not in material default, or alleged to be in material default, under any agreement, instrument or obligation relating to the Acquired Operations or the Acquired Properties. All parties with whom the Seller has agreements relating to the Acquired Operations or the Acquired Properties are in substantial compliance therewith and are not in material default thereunder.

(h) The Seller has heretofore delivered to the Buyer the consolidated balance sheet of the Seller and its subsidiary companies as of December 31, 1960, and the related statements of earnings, retained earnings and additional paid-in capital for the year then ended, with the report thereon of Messrs. Touche, Ross, Bailey & Smart. All of such financial statements (including the related notes) are correct and complete and present fairly the consolidated financial position of the Company and its subsidiary companies as of December 31, 1960 and the consolidated

results of their operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. Since December 31, 1960, there have been no changes in the assets or liabilities or financial condition of the Company or any of its subsidiary companies from that set forth in said balance sheet (and the related notes), other than changes in the ordinary course of business and other than the purchase of a lead smelting plant at Detroit, Michigan for approximately $1,000,000, the effect of which has not been materially adverse.

(i) The execution and delivery of this Agreement by the Seller, and the performance of the transactions contemplated hereby, have been duly and effectively authorized and approved by the Board of Directors of the Seller and no authorization or approval by the stockholders of the Seller is required.

6. Certain Representations and Warranties by the Buyer. The Buyer hereby represents and warrants as follows:

(a) The Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and is duly qualified to do business and is in good standing in the States of Michigan and Ohio.

(b) The consummation of the transactions contemplated hereby will not result in any breach of, or constitute a default under, any agreement or other instrument or obligation to which the Buyer is a party or by which the Buyer may be bound or affected.

(c) The execution and delivery of this Agreement by the Buyer, and the performance of the transactions contemplated hereby, have been duly and effectively authorized and approved by the Board of Directors of the Buyer and no authorization or approval by the stockholders of the Buyer is required.

7. Certain Additional Lists of Agreements and Personnel Data.

The Seller has delivered to the Buyer lists and brief descriptions of the following, including, without limitation, all liabilities and obligations of the Seller in respect thereof, and represents and warrants that such lists and descriptions are substantially correct and complete as of the date hereof:

(a) All the forms of product warranties and adjustment policies used by the Seller in connection with the Acquired Operations.

(b) All the pension and other employee benefit plans or arrangements relating to the Acquired Operations, including the tenth annual actuarial reports with respect to the Seller's Pension Plan and the Seller's UAW Pension Plan.

(c) All the collective bargaining agreements relating to the Acquired Operations.

(d) All the employees of the Seller associated with the Acquired Operations whom the Seller will make available to the Buyer, as the Buyer may select, setting forth, in the case of salaried employees, their titles, departments to which they are now assigned, current rates of compensation, age and years of service and, in the case of hourly rate employees, their ages and years of service and the applicable work classifications, incentive base rates and straight time productive and non-productive rates.

(e) All the policies of fire, liability, business interruption and other forms of insurance relating to the Acquired Operations.

(f) All the outstanding workmen's compensation claims and cases relating to employees connected with the Acquired Operations.

8. Further Agreements of the Seller.

(a) The Seller hereby agrees, in connection with its spark plug operations, (i) to make available to the Buyer certain of the Seller's engineering, manufacturing, after market and foreign distribution personnel, as the Buyer may select, and (ii) to supply the Buyer with the books and records necessary for the proper conduct of such operations.

(b) The Seller hereby agrees, in connection with its battery operations, (i) to make available to the Buyer (A) certain of its plant personnel at Owosso, Michigan and (B) certain of its after market and foreign distribution personnel, as the Buyer may select, and (ii) to supply the Buyer with such books and records necessary for the proper conduct of such operations.

(c) The Seller hereby agrees to supply the Buyer from the date hereof to April 12, 1964, on a reasonable fee basis to be agreed upon, with such engineering and technical services as the Buyer may reasonably request in connection with the battery operations at Owosso, Michigan.

(d) The Seller hereby agrees to supply the Buyer from the date hereof to October 12, 1961, on a reasonable fee basis to be agreed upon, with such operating services including services relating to temporary warehousing order processing, shipping, plant scheduling, accounting and payroll matters, as the Buyer may reasonably request in connection with the Acquired Operations and Acquired Properties.

(e) The Seller hereby agrees to act as receiving agent for all the Buyer's outstanding accounts receivable in connection with the Acquired Operations, provided that the Seller has no responsibility for the collection thereof or any other matter in connection therewith except for the exercise of reasonable care in the receipt and the transmission thereof to the Buyer.

9. Further Agreements of the Buyer.

(a) The Buyer hereby agrees to supply the Seller from the date hereof to April 12, 1964, on a reasonable fee basis to be agreed upon, with such engineering and technical services as the Seller may reasonably request in connection with (i) the spark plug operations of the Seller not being acquired by the Buyer, and (ii) the spark plug operations to be established by the Seller in the United States.

(b) The Buyer hereby agrees to supply to or upon the order of the Seller such quantities and types of "AUTOLITE" brand (and any variant thereof) spark plugs and batteries as the Seller may require (i) to perform its obligations under its existing agreements with the original equipment manufacturers from the date hereof to the expiration of such agreements (including any renewals thereof which the Seller is obligated to grant), at the respective prices and times and on the other specifications, terms and conditions provided for in such agreements, and (ii) for sale to original equipment manufacturers, such products to be sold by the Buyer to the Seller upon terms and conditions, and at prices, generally competitive with those in the industry and mutually agreeable to the Buyer and the Seller.

(c) The Buyer hereby agrees to act as receiving agent for all the Seller's outstanding accounts receivable in connection with the Acquired Operations, provided that the Buyer has no responsibility for the collection thereof or any other matter in connection therewith except for the exercise of reasonable care in the receipt and the transmission thereof to the Seller.

(d) In the event that, upon any cancellations by the Seller of any insurance with respect to the Acquired Properties or the Acquired Operations, the Seller shall receive a refund of premium at less than the pro rata rate, the Buyer shall pay the Seller the difference between the amount thus received and the amount that would have been received at the pro rata rate.

10. Agreements Relating to Employees and Employee Benefit Plans.

(a) General; Liabilities and Obligations. Except as expressly provided in this Section, the Buyer does not assume any liability or obligation of the Seller to its employees, whether under its collective bargaining agreements, personnel policies or otherwise. The Buyer shall not be responsible for any liability arising out of the Seller's employment of any person including, without limitation, any workmen's compensation liability and any liability under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, or any state unemployment tax law. With respect to any workmen's compensation liability of the Buyer that shall arise in the period from the date hereof to April 12, 1963 as a result of continued exposure during successive employment by the Seller and the Buyer, the Seller shall reimburse the Buyer therefor in the proportion that the

period of exposure while employed by Seller bears to the total period of exposure.

(b) Pension Plans.

(i) Obligation for Persons Already Retired and Deferred Termination Benefits. All retirement benefits (including, without limitation, normal, early, incapacity or deferred termination retirement benefits) for persons who as of the date hereof have retired or applied for (and are entitled to) retirement benefits under the Seller's "UAW Pension Plan" and the Seller's "Pension Plan" (which covers salaried and certain other employees not covered by the Seller's UAW Pension Plan and which hereinafter is referred to as the "Seller's Pension Plan"), and all deferred termination benefits under either of such plans for persons whose service with the Seller shall not be recognized for benefit purposes under a retirement plan of the Buyer, shall remain an obligation of the Seller under its appropriate retirement plan.

(ii) Provisions Regarding the Seller's Pension Plan. The Buyer shall amend its General Retirement Plan to admit employees of the Seller (including those on layoff and those on leave of absence) as of the

date hereof who are covered by the Seller's Pension Plan and who within six months thereafter become employees of the Buyer, to membership in Buyer's Plan with such creditable service thereunder as shall be generally comparable to their creditable service as of the date hereof under the Seller's Pension Plan; provided, however, that such amendment shall not become effective unless and until there shall have been a transfer from the trust under the Seller's Pension Plan to the Trustee under the Buyer's General Retirement Plan of that portion of the sum of the assets of such trust and any other amount funded (including, without limitation, the value of all annuities and all funds held for the purchase of annuities) under the Seller's Pension Plan as is allocable on an actuarial basis, as determined below, to such employees, and unless and until appropriate Internal Revenue Service rulings satisfactory to the Buyer shall have been received assuring Buyer, among other things, of its right to deduct contributions made by it with respect to such service.

Determination of the portion of assets to be so transferred shall be made as of the date hereof by a qualified actuary selected by the Seller, subject

to review and concurrence by a qualified actuary selected by the Buyer. In making such determination, the portion of the assets of the trust under the Seller's Pension Plan to be transferred to the trustee under the Buyer's General Retirement Plan shall bear the same percentage relationship to the sum of the total of the assets of the trust plus all other amounts funded (including, without limitation, the value of all annuities and all funds held for the purchase of annuities) under the Seller's Pension Plan as (a) the amount of accrued liabilities under the Seller's Pension Plan, immediately prior to the date hereof, for all employees of the Seller admitted to membership under the General Retirement Plan of the Buyer bears to (b) the amount of accrued liabilities under the Seller's Pension Plan, immediately prior to the date hereof, for all employees and other persons under the Seller's Pension Plan, including persons referred to in paragraph (b)(i) of this section. If the actuary selected by the Buyer does not concur in the proposed determination of the actuary selected by the Seller, such actuaries shall select a third actuary who, after taking into account the findings of the other two actuaries, shall make such determination.

The Seller shall take such action as is necessary or appropriate to cause the transfer of the assets and other amounts described above. As a condition to the Seller's obligation to cause such transfer, it is recognized that Seller requires the approval of the trustee under the Seller's Pension Plan to such transfer and an appropriate Internal Revenue Service ruling satisfactory to the Seller assuring Seller, among other things, of its right to deduct contributions to be made by it under its amended plan. Notwithstanding anything in this paragraph, it shall be in the sole discretion of the Buyer as to whether or not the Buyer shall recognize such service with respect to any such employees represented by a collective bargaining representative; and further, any recognition of such service and any transfer of assets with respect to such employees shall be subject to appropriate agreements or arrangements being made with the collective bargaining representative satisfactory to the Seller and/or the Buyer, as the case may be.

(iii) Provisions Regarding the Seller's UAW Pension Plan. If and to the extent provision is made in a retirement plan of the Buyer for recognizing service with the Seller for all or any of the

Seller's employees (including those on layoff and those on leave of absence) at the date hereof who are covered by the Seller's UAW Pension Plan as creditable service under such retirement plan of the Buyer, the Seller shall use its best efforts to cause to be transferred from the trust under the Seller's UAW Pension Plan to the appropriate trust or trusts under such retirement plan of the Buyer that portion of the assets of the trust and any other amount funded (including, without limitation, the value of all annuities and all funds held for the purchase of annuities), under the Seller's UAW Pension Plan as is allocable on an actuarial basis, as determined below, to the employees for whom such creditable service is recognized. Determination of the portion of assets to be so transferred shall be made as of the date hereof by a qualified actuary selected by the Seller, subject to review and concurrence by a qualified actuary selected by the Buyer. In making such determination, the total amount of assets under the Seller's UAW Pension Plan to be transferred to the trustee under the aforementioned retirement plan of the Buyer shall bear the same percentage relationship to the sum of the total assets of the trust plus all other amounts funded

(including, without limitation, the value of all annuities and all funds held for the purchase of annuities) under the Seller's UAW Pension Plan as (a) the amount of accrued liabilities under the Seller's UAW Pension Plan, immediately prior to the date hereof, for all employees of the Seller admitted to membership under such retirement plan of the Buyer bears to (b) the amount of accrued liabilities under the Seller's UAW Pension Plan, immediately prior to the date hereof, for all employees and other persons under such Pension Plan, including persons referred to in paragraph (b)(i) of this section. If the actuary selected by the Buyer does not concur in the proposed determination of the actuary selected by the Seller, such actuaries shall select a third actuary who, after taking into account the findings of the other two actuaries, shall make such determination.

Any amendment to a retirement plan of the Buyer providing for recognition of creditable service of employees covered by the Seller's UAW Pension Plan shall be effective only after the transfer of assets described above shall have been made, and after appropriate Internal Revenue Service rulings satisfactory to the

Buyer shall have been received assuring the Buyer, among other things, of its right to deduct contributions made by it with respect to such service. As a condition to the Seller's obligation to cause such transfer of assets, it is recognized that the Seller may require the execution of such agreements with the collective bargaining representative of such employees, including such amendments of the Seller's UAW Pension Plan, and such Internal Revenue Service rulings as may be appropriate and satisfactory to the Seller.

(iv) The Seller's Retirement Plan for Salaried Employees. The Seller agrees to use its best efforts to make appropriate arrangements to provide Seller's employees who are "Participants" as of the date hereof under the Seller's "Retirement Plan for Salaried Employees" (which provides supplemental non-contributory retirement benefits for certain salaried employees and is a plan separate and apart from the Seller's Pension Plan) and who subsequently become employees of the Buyer, with retirement benefits in accordance with the benefits under such Plan based upon employment with the Seller.

(v) Limitation on Termination of the Seller's Plans. The Seller shall not exercise, except with the Buyer's consent, any right of election that it might have to terminate or partially terminate the Seller's Pension Plan in its application to Seller's employees under such plan who thereafter become employees of Buyer; provided that, if any group of such employees is represented by a collective bargaining representative and the condition regarding agreements and arrangements with such representative contained in paragraph (b)(ii) of this section shall not have been concluded by April 12, 1962, or such later date as the parties may fix by agreement (which agreement shall not be unreasonably withheld), the Seller may exercise its right to terminate such plan with respect to such group of employees; and provided further, that the Seller may exercise its right to terminate such plan with respect to such employees if Seller is unable to obtain the consent of the trustee to the transfer of assets and an appropriate ruling from the Internal Revenue Service by April 12, 1962, or such later date as the parties may fix by agreement (which agreement shall not be unreasonably withheld). The Seller shall not exercise, except with the

Buyer's consent, any right of election that it might have to terminate or partially terminate the Seller's UAW Pension Plan prior to October 12, 1961 in its application to Seller's employees under such Plan who thereafter become employees of the Buyer; provided, however, that if an appropriate agreement is made by Buyer, prior to October 12, 1961, with the collective bargaining representative of the employees covered by such plan who shall have become employees of the Buyer providing for recognition of service with Seller under a retirement plan of the Buyer in accordance with paragraph (b)(iii) of this section, then the Seller shall not exercise such right of election unless by April 12, 1962, or such later date as the parties may fix by agreement (which agreement shall not be unreasonably withheld) the appropriate Internal Revenue Service rulings have not been obtained and the transfer of the trust assets from the Seller's UAW Pension Plan to such retirement plan of the Buyer has not been made.

(c) SUB Plans. If and to the extent that the Buyer makes provision under a Supplemental Unemployment Benefit Plan (hereinafter called "SUB Plan") recognizing service with the Seller for the Seller's employees (including those on layoff and those on leave of absence) as of the date hereof who thereafter become employees of the Buyer,

the Seller (without waiving any of its rights under its SUB Plan) shall use its best efforts to cause to be transferred to the trust under the Buyer's SUB Plan that portion of the assets of the trust under the Seller's SUB Plan as is allocable as of April 12, 1961 to such employees, such allocation being determined in general on the basis of the ratio between the credit units credited to such employees to those credited to all employees under the Seller's SUB Plan; provided, however, that no such transfer shall be made unless Seller shall have obtained approval by the UAW-AFL-CIO of any necessary amendment of its SUB Plan and favorable rulings from the Internal Revenue Service and the United States Department of Labor. The assets, if or when transferred, shall be adjusted appropriately by the amount of any benefits that shall have been paid under the Seller's SUB Plan to such employees after the date hereof. The Seller shall not terminate its SUB Plan with respect to either its Owosso or Fostoria plants prior to October 12, 1961, except with the consent of the Buyer. If terminated, Seller's SUB Plan shall be deemed terminated as of April 12, 1961.

(d) Insurance Programs. With respect to the Seller's active employees as of the date hereof, the Seller represents that insurance coverage under its programs is provided for periods

specified in the policies after the date hereof. The Seller shall use its best efforts to make such arrangements for extending the period of coverage for such employees who become Buyer's employees upon the date hereof, if so requested by the Buyer. The Buyer shall reimburse the Seller for the costs incurred by it in providing such insurance coverage subsequent to the date hereof. The Seller shall continue arrangements permitting its employees on layoff or leave of absence immediately prior to the date hereof to continue coverage under the Seller's present insurance programs for the period provided thereunder, with the Seller and its employees continuing to pay the full cost thereof.

(e) Vacation Pay. The Seller shall pay, directly to hourly employees of the Seller at the date hereof who thereafter become employees of the Buyer, the amounts of all vacation benefits accrued in the calendar year 1960 for 1961 vacations of such employees. The Seller shall pay to the Buyer an amount which shall be in the same proportion to the amount of vacation benefits that would have accrued for such employees for 1962 vacations if they had remained in the employ of the Seller through December 31, 1961 as 102 days bears to 365 days.

(f) Employment with the Buyer. References in this Agreement to "employment with the Buyer," "becoming employees of the Buyer," and similar terms shall not be deemed to preclude the Buyer from providing that such persons who do not accept regular employment by signing the Buyer's usual forms shall not be deemed to be referred to by such references and shall be deemed to have been temporary employees of the Buyer during the period immediately subsequent to this Agreement.

11. Proration of Certain Property Taxes. The Seller and the Buyer hereby agree that ad valorem property taxes on real property included in the Acquired Properties, and on machinery and equipment included in the Acquired Properties for use, as such, by the Buyer, assessed as of the Tax Day next preceding the date hereof, shall be prorated as follows: the Seller shall bear the expense of such taxes in the ratio that the number of days of the current calendar year to and including the day prior to the closing bears to 365; the Buyer shall bear the balance of said taxes. The Buyer shall remit all such taxes prior to delinquency. The Seller agrees to reimburse the Buyer for the Seller's prorated share, as aforesaid, promptly upon receipt of a billing therefor accompanied by a proper proration schedule. No other property taxes shall be prorated.

12. Expenses. Each party shall pay its own expenses incident to the preparation and carrying out of this Agreement and the transactions contemplated hereby including, without limitation, all fees of its counsel, accountants and actuaries; provided that if any matter is referred for determination to an accounting firm (as provided in Section 2 hereof), or to an actuarial firm (as provided in Section 10 hereof), the Buyer and the Seller will each pay one-half of the respective fees of such firms in connection therewith.

13. Brokers. Each party to this Agreement represents and warrants that no broker or finder has acted for it in connection with this Agreement or the transactions contemplated hereby and that no broker or finder is entitled to any brokerage or finder's fee or other commission in respect thereof based in any way on agreements, arrangements or understandings made by it; and each party to this Agreement agrees, with respect to any claim for any such brokerage or finder's fee or other commission based in any way on any agreement, arrangement or understanding made or alleged to have been made by it, to indemnify and hold harmless the other party hereto.

14. Survival of Representations and Warranties. All covenants, agreements, representations and warranties made herein, and in the bills of sale, deeds, assignments and other instruments of

transfer and conveyance being delivered simultaneously herewith (and all statements contained in any certificate or other instrument delivered by the Seller to the Buyer hereunder shall be deemed to constitute representations and warranties made by the Seller), shall survive the execution and delivery of this Agreement and the execution and delivery of all such other documents.

15. Assignment. This Agreement shall not be assignable by either party. Nothing in this Agreement, express or implied, is intended to confer upon any person, other than the parties hereto and their successors and assigns, any rights under or by reason of this Agreement.

16. Definitions.

(a) For purposes of this Agreement,

(i) The term "Acquired Operations" shall mean (i) all spark plug operations of the Seller carried on at Fostoria, Ohio, (ii) all battery operations of the Seller carried on at Owosso, Michigan, (iii) all operations (except Niagara Falls warehouse) of the Seller carried on at other locations and directly related to or connected with (i) or (ii) above as distinct from other operations, and (iv) all after-market distribution operations of the Seller, wherever carried on (except Canada, Brazil, Venezuela), of spark plugs and batteries under the name "Autolite", and of electrical parts, wire and cable.

(ii) The term "after market" shall not include original equipment or private brand business;

(iii) the term "battery" shall mean all batteries manufactured by the Seller other than industrial and aircraft batteries;

(iv) the term "the date hereof" shall mean [11:00] P.M., Eastern Standard Time, April 12, 1961;

(v) the term "subsidiary" shall mean, with respect to the Buyer, any corporation a majority of the voting stock of which is owned or controlled, directly or indirectly, by the Buyer.

(b) For purposes of Sections 1(f), 3(b), 3(d), and 7(a) of this Agreement, the term "the Seller" shall mean The Electric Autolite Company and its wholly-owned subsidiary, Autolite Export Company, Inc.

17. Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Michigan.

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement on the date first above written.

ATTEST:

/s/ F. J. Kennedy
Secretary

THE ELECTRIC AUTOLITE COMPANY

By /s/ R. H. Davies
President

ATTEST:

/s/ John A. Moekle
Assistant Secretary

FORD MOTOR COMPANY

By /s/ Irving A. Duffy
Vice President

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FORD MOTOR CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

No. 70-113. Argued November 18, 1971—
Decided March 29, 1972

In this divestiture action under § 7 of the Celler-Kefauver Antimerger Act, the Government challenged the acquisition by appellant, Ford, the second largest automobile manufacturer, of certain assets of Electric Autolite Co. (Autolite), an independent manufacturer of spark plugs and other automotive parts. The acquisition included the Autolite trade name, Autolite's only domestic spark plug plant, and extensive rights to its nationwide distribution organization for spark plugs and batteries. The brand used in the spark plug replacement market ("aftermarket") has historically been the same as the original equipment (OE) brand. Autolite and other independents had furnished manufacturers with OE plugs at or below cost, seeking to recoup their losses by profitable aftermarket sales. Ford, which previously had bought all its spark plugs from independents and was the largest purchaser from that source, made the Autolite acquisition in 1961 for the purpose of participating in the aftermarket. At about that time General Motors (GM) had about 30% of the domestic spark plug market. Autolite had 15%, and Champion, the only other major independent, had 50% (which declined to 40% in 1964, and 33% in 1966). The District Court found that the industry's oligopolistic structure encouraged maintenance of the OE tie and that spark plug manufacturers, to the extent that they are not owned by auto makers, will compete more vigorously for private brand sales in the aftermarket. The court held that the acquisition of Autolite violated § 7 since its effect "may be substantially to lessen competition" in automotive spark plugs because: (1) "as both a prime candidate to manufacture and the major customer

Syllabus

consequences of its entry as a manufacturer will be eliminated. P. 10.

(b) The ancillary injunctive provisions are necessary to give the divested plant an opportunity to re-establish its competitive position and to nurture the competitive forces at work in the market place. Pp. 11–15.

286 F. Supp. 407, 315 F. Supp. 372, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined and in which (as to Part I and part of Part II) BLACKMUN, J., joined. STEWART, J., filed an opinion concurring in the result. BURGER, C. J., and BLACKMUN, J., filed opinions concurring in part and dissenting in part. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 70–113

Ford Motor Company, Appellant, v. United States et al. | On Appeal from the United States District Court for the Eastern District of Michigan.

[March 29, 1972]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a direct appeal, 32 Stat. 823, 15 U. S. C. § 29, from a judgment of the District Court (286 F. Supp. 407, 315 F. Supp. 372), holding that Ford Motor Company (Ford) violated § 7 of the Celler-Kefauver Anti-merger Act [1] by acquiring certain assets from Electric Autolite Company (Autolite). The assets included the Autolite trade name, Autolite's only spark plug plant in this country (located at New Fostoria, Ohio), a battery plant, and extensive rights to its nationwide distribution organization for spark plugs and batteries. The present appeal [2] is limited to that portion of the judgment relating to spark plugs and ordering Ford to divest the Autolite

[1] Section 7 provides in part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18.

[2] We noted jurisdiction June 7, 1971. 403 U. S. 903.

name and the spark plug plant. The ancillary injunctive provisions are also here for review.

I

Ford, the second leading producer of automobiles, General Motors, and Chrysler together account for 90% of the automobile production in this country. Though Ford makes a substantial portion of its parts, prior to its acquisition of the assets of Autolite, it did not make spark plugs or batteries but purchased those parts from independent companies.

The original equipment of new cars, insofar as spark plugs are concerned, is conveniently referred to as the OE tie. The replacement market is referred to as the *aftermarket*. The independents, including Autolite, furnished the auto manufacturers with OE plugs at cost or less, about six cents a plug, and they continued to sell at that price even when their costs increased threefold. The independents sought to recover their losses on OE sales by profitable sales in the *aftermarket* where the requirement of each vehicle during its lifetime is about five replacement plug sets. By custom and practice among mechanics, the *aftermarket* plug is usually the same brand as the OE plug. See generally Hansen & Smith, The Champion Case: What is Competition? 29 Harv. Bus. Rev. 89 (May 1951).

Ford was anxious to participate in this *aftermarket* and after various efforts, not relevant to the present case, concluded that its effective participation in the *aftermarket* required "an established distribution system with a recognized brand name, a full line of high volume service parts, engineering experience in replacement designs, low volume production facilities and experience, and the opportunity to capitalize on an established car population."

Ford concluded it could develop such a division of its

own but decided that course would take from five to eight years and be more costly than an acquisition. To make a long story short, it acquired certain assets of Autolite in 1961.

At that time General Motors had entered the spark plug manufacturing field, making the AC brand. The two other major domestic producers were independents—Autolite and Champion. When Ford acquired Autolite, whose share of the domestic spark plug market was about 15%, only one major independent was left and that was Champion whose share of the domestic market declined from just under 50% in 1960 to just under 40% in 1964 and to about 33% in 1966. At the time of the acquisition, General Motors' market share was about 30%. There were other small manufacturers of spark plugs but they had no important share of the market.[3]

The District Court held that the acquisition of Autolite violated § 7 of the Celler-Kefauver Anti-merger Act because its effect "may be substantially to lessen competition."[4] It gave two reasons for its decision.

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[3] Autolite did not sell all of its assets to Ford and changed the name of the parts of its business that it retained to Eltra Corp. which in 1962 began manufacturing spark plugs in Decatur, Alabama, under the brand name Prestolite. But in 1964 it had only 1.6% of the domestic business. Others included Atlas, sponsored by Standard Oil, with 1.4% of that business, and Riverside, sponsored by Montgomery Ward, with 0.6%. As further stated by the District Court:

"Most of the manufacturing for the private labels among these marketers is done by Eltra and General Battery and Ceramic Corporation, the only producers of any stature at all after the Big Three." 286 F. Supp., at 435.

[4] The words were suggested by the Federal Trade Commission which told the Congress:

"Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large

First, prior to 1961 when Ford acquired Autolite it had a "pervasive impact on the aftermarket," 315 F. Supp., at 375, in that it was a moderating influence on Champion and on other companies derivatively. It explained that reason as follows:

> "An interested firm on the outside has a twofold significance. It may someday go in and set the stage for noticeable deconcentration. While it merely stays near the edge, it is a deterrent to current competitors. *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 84 S. Ct. 1710, 12 L. Ed. 2d 775 (1964). This was Ford uniquely, as both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly. Given the chance that Autolite would have been doomed to oblivion by defendant's grass-roots entry, which also would have destroyed Ford's soothing influence over replacement prices, Ford may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication. Had Ford taken the internal-expansion route, there would have been no illegality; not, however, because the result necessarily would have been commendable, but simply because that

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enterprise. As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them. . . ." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5.

The Committee defined the words "may be" as follows:

". . . the concept of reasonable probability conveyed by the words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." *Id.*, p. 6.

course has not been proscribed." 286 F. Supp., at 441.

See also *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U. S. 568; *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158.

Second, the District Court found that the acquisition marked "the foreclosure of Ford as a purchaser of about ten per cent of total industry output." 315 F. Supp., at 375. The District Court added:

> "In short, Ford's entry into the spark plug market by means of the acquisition of the factory in Fostoria and the trade name 'Autolite' had the effect of raising the barriers to entry into that market as well as removing one of the existing restraints upon the actions of those in the business of manufacturing spark plugs.
>
> "It will also be noted that the number of competitors in the spark plug manufacturing industry closely parallels the number of competitors in the automobile manufacturing industry and the barriers to entry into the auto industry are virtually insurmountable at present and will remain so for the foreseeable future. Ford's acquisition of the Autolite assets, particularly when viewed in the context of the original equipment (OE) tie and of GM's ownership of AC, has the result of transmitting the rigidity of the oligopolistic structure of the automobile industry to the spark plug industry, thus reducing the chances of future deconcentration of the spark plug market by forces at work within that market." *Ibid.*

See also *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U. S. 592; *Brown Shoe Co.* v. *United States*, 370 U. S. 294; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586.

We see no answer to that conclusion if the letter and spirit of the Celler-Kefauver Anti-merger Act[5] are to be honored. See *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 362–363; *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158, 170–171; *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 311–323.

It is argued, however, that the acquisition had some beneficial effect in making Autolite a more vigorous and effective competitor against Champion and General Motors than Autolite had been as an independent. But

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[5] Congressman Celler in testifying for the Celler-Kefauver bill that was the 1950 amendment to § 7 of the Clayton Act said:

". . . the worth of the individual is the worth of the Nation; no more and no less. That which strengthens the individual bolsters the Nation; that which dwarfs the individual belittles the Nation." Hearings on H. R. 988, Subcommittee No. 3, H. Judiciary Committee, 81st Cong., 1st Sess., May 18, 1949, Serial No. 10, pp. 14–15.

Senator Kefauver spoke in the same vein:

". . . if our democracy is going to survive in this country we must keep competition, and we must see to it that the basic materials and resources of the country are available to any little fellow who wants to go into business.

"Charts and statistics will show that every year there is more and more concentration, with more and more corporations purchasing out their competitors, so that unless this trend is halted we are going to come to a place where the basic industries and business of America are controlled by a very, very small group of a small number of corporations.

"We have already reached that point in a great many of our basic industries. The evil of that course is quite apparent. When people lose their economic freedom, they lose their political freedom.

"When the destiny of people over the land is dependent upon the decision of two or three people in a central office somewhere, then the people are going to demand that the Government do something about it.

"When it reaches that stage, it is going to result in statism of one sort or another; and whichever sort it may be, one is equally as bad as another, as I see it." *Id.*, at 12.

what we said in *United States* v. *Philadelphia National Bank, supra,* disposes of that argument. A merger is not saved from illegality under § 7, we said,

> "because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anti-competitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid." 374 U. S., at 371.

Ford argues that the acquisition left the marketplace with a greater number of competitors. To be sure, after Autolite sold its New Fostoria plant to Ford, it constructed another in Decatur, Alabama, which by 1964 had 1.6% of the domestic business. Prior to the acquisition, however, there were only two major independent producers and only two significant purchasers of original equipment spark plugs. The acquisition thus aggravated an already oligopolistic market.

As we indicated in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 323–324:

> "The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 314, which 'deprive[s] . . . rivals of a fair opportunity to compete.' H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Every extended vertical

> arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement."

Moreover, Ford made the acquisition in order to obtain a foothold in the *aftermarket*. Once established, it would have every incentive to perpetuate the OE tie and thus maintain the virtually insurmountable barriers to entry to the *aftermarket*.

II

The main controversy here has been over the nature and degree of the relief to be afforded.

During the year following the District Court's finding of a § 7 violation, the parties were unable to agree upon appropriate relief. The District Court then held nine days of hearings on the remedy and, after full consideration, concluded that divestiture and other relief was necessary.

The OE tie, it held, was in many respects the key to the solution since the propensity of the mechanic in a service station or independent garage is to select as a replacement the spark plug brand that the manufacturer installed in the car. The oligopolistic structure of the spark plug manufacturing industry encourages the continuance of that system. Neither AC nor Autolite sells private label plugs. It is obviously in the self-interest of OE plug manufacturers to discourage private brand sales and to encourage the OE tie. There are findings that the private brand sector of the spark plug market will grow substantially in the next decade because mass merchandisers are entering this market in force. They not only sell all brands over the counter but have service bays where many carry only spark plugs of their own proprietary brand. It is anticipated that by 1980 the total private brand portion of the spark plug market may

then represent 17% of the total *aftermarket*. The District Court added:

> "To the extent that the spark plug manufacturers are not owned by the auto makers, it seems clear that they will be more favorably disposed toward private brand sales and will compete more vigorously for such sales. Also, the potential entrant continues to have the chance to sell not only the private brand customer but the auto maker as well." 315 F. Supp., at 378.

Accordingly the decree

(1) enjoined Ford for 10 years from manufacturing spark plugs,

(2) ordered Ford for five years to purchase one half of its total annual requirement of spark plugs from the divested plant under the "Autolite" name,

(3) prohibited Ford for the same period from using its own tradenames on plugs,

(4) protected New Fostoria, the town where the Autolite plant is located, by requiring Ford to continue for 10 years its policy of selling spark plugs to its dealers at prices no less than its prevailing minimum suggested jobbers' selling price,[6]

(5) protected employees of the New Fostoria plant by ordering Ford to condition its divestiture sale on the purchaser's assuming the existing wage and pension obligations and to offer employment to any employee displaced by a transfer of nonplug operations from the divested plant.[7]

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[6] The District Court found this provision necessary in order to assemble an adequate distribution system for the *aftermarket*. Without it, service stations and independent jobbers would be unable to compete with franchised car dealers for the replacement business. Ford does not challenge this provision in this Court.

[7] Ford does not challenge this ancillary portion of the District Court decree protecting the employees of the New Fostoria plant.

The relief in an antitrust case must be "effective to redress the violations" and "to restore competition."[8] *United States* v. *du Pont & Co.*, 366 U. S. 316, 326. The District Court is clothed with "large discretion" to fit the decree to the special needs of the individual case. *International Salt Co.* v. *United States*, 332 U. S. 392, 401; *United States* v. *du Pont & Co.*, 353 U. S. 586, 608; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185.

Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws. *United States* v. *du Pont & Co.*, 366 U. S. 316, 328–335; *United States* v. *Crescent Amusement Co., supra,* at 189; *Schine Chain Theatres* v. *United States*, 334 U. S. 110, 128; *United States* v. *El Paso Gas Co.*, 376 U. S. 651.

Divestiture is a start toward restoring the pre-acquisition situation. Ford once again will then stand as a

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[8] The suggestion that antitrust "violators may not be required to do more than return the market to the *status quo ante*," *post*, at 8, is not a correct statement of the law. In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, we sustained broad injunctions regulating motion picture licenses and clearances which were not related to the *status quo ante*. *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F. 2d 223 (CADC 1962), concerned the enforcement powers of the Federal Trade Commission, not the equitable powers of the District Court.

Section 4 of the Sherman Act, 15 U. S. C. § 4 and § 15 of the Clayton Act, 15 U. S. C. § 25, empower "the Attorney General to institute proceedings in equity to prevent and restrain . . . violations" of the antitrust laws. The relief which can be afforded under these statutes is not limited to the restoration of the *status quo ante*. There is no power to turn back the clock. Rather, the relief must be directed to that which is "necessary and appropriate in the public interest *to eliminate the effects* of the acquisition offensive to the statute," *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 607–608 (emphasis added), or which will "*cure the ill effects* of the illegal conduct and *assure the public freedom from* its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88 (emphasis added).

large industry customer at the edge of the market with a renewed interest in securing favorable terms for its substantial plug purchases. Since Ford will again be a purchaser, it is expected that the competitive pressures that existed among other spark plug producers to sell to Ford will be re-created. The divestiture should also eliminate the anticompetitive consequences in the *aftermarket* flowing from the second largest automobile manufacturer's entry through acquisition into the spark plug manufacturing business.

The divested plant is given an incentive to provide Ford with terms which will not only satisfy the 50% requirement provided for five years by the decree but which even after that period may keep at least some of Ford's ongoing purchases. The divested plant is awarded at least a foothold in the lucrative *aftermarket* and is provided an incentive to compete aggressively for that market.

As a result of the acquisition of Autolite, the structure of the spark plug industry changed drastically, as already noted. Ford, which before the acquisition was the largest purchaser of spark plugs from the independent manufacturers, became a major manufacturer. The result was to foreclose to the remaining independent spark plug manufacturers the substantial segment of the market previously open to competitive selling and to remove the significant pro-competitive effects in the concentrated spark plug market that resulted from Ford's position on the edge of the market as a potential entrant.

To permit Ford to retain the Autolite plant and name and to continue manufacturing spark plugs would perpetuate the anticompetitive effects of the acquisition.[9]

[9] "[I]t would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it has no right to acquire—namely, to restrain commerce by suppressing competition—and is proceeding

The District Court rightly concluded that only divestiture would correct the condition caused by the unlawful acquisition.

A word should be said about the other injunctive provisions. They are designed to give the divested plant an opportunity to establish its competitive position. The divested company needs time so it can obtain a foothold in the industry. The relief ordered should "cure the ill effects of the illegal conduct and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88, and it necessarily must "fit the exigencies of the particular case." *International Salt Co.* v. *United States*, 332 U. S. 392, 401. Moreover, "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 334.

Ford concedes that "[i]f New Fostoria is to survive it must for the foreseeable future become and remain the OE supplier to Ford and secure and retain the benefits of such OE status in sales of replacement plugs." The ancillary measures ordered by the District Court are designed to allow Autolite to reestablish itself in the OE and replacement markets and to maintain it as a viable competitor until such time as forces already at work within the marketplace weaken the OE tie. Thus Ford is prohibited for 10 years from manufacturing its own plugs.[10] But in five years it can buy its plugs from any source and use its name on OE plugs.

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to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 347.

[10] Ford argues that the 10-year prohibition on its manufacture of spark plugs will lessen competition because it will remove a potential competitor from the marketplace. This prohibition, however, is

But prior to that time Ford cannot use or market plugs bearing the Ford trade name. In view of the importance of the OE tie, if Ford were permitted to use its own brand name during the initial five-year period, there would be a tendency to impose the oligopolistic structure of the automotive industry on the replacement parts market and the divested enterprise might well be unable to become a strong competitor. Ford argues that any prohibition against the use of its name is permissible only where the name deceives or confuses the public.[11] But this is not an unfair competition case. The temporary ban on the use of the Ford name is designed to restore the pre-acquisition competitive structure of the market.

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merely a step towards the restoration of the *status quo ante*, and is, moreover, necessary for Autolite to reestablish itself.

[11] Ford also argues that the right to its own trade name is a constitutionally protected property right (cf. *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *United States* v. *Tropiano*, 418 F. 2d 1069, 1076 (CA2 1969)), and that the remedial provision of § 15 of the Clayton Act should not be construed to limit the use of this right. Even on that assumption, we could not accept the conclusion advanced by Ford.

Even constitutionally protected property rights such as patents may not be used as levers for obtaining objectives proscribed by the antitrust laws. *E. g., Besser Manufacturing Co. v. United States*, 343 U. S. 444, 448–449; *Morton Co.* v. *Suppiger*, 314 U. S. 488 Here, the use by Ford of its trade name would perpetuate the OE tie and would have the prohibited effect of hindering the re-entry of Autolite to the spark plug market as a viable competitor.

"The trade mark may become a detrimental weapon if it is used to serve a harmful or injurious purpose. If it becomes a tool to circumvent free enterprise and unbridled competition, public policy dictates that the rights enjoyed by its ownership be kept within their proper bounds. If a trade mark may be the legal basis for allocating world markets, fixing of prices, restricting competition, the unfailing device has been found to destroy every vestige of inhibition set up by the Sherman Act." *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 316 (ND Ohio 1949), aff'd 341 U. S. 593 (1951).

The requirement that, for five years, Ford purchase at least half of its spark plug requirements from the divested company under the Autolite label is to give the divested enterprise an assured customer while it struggles to be re-established as an effective, independent competitor.

It is suggested, however, that "the District Court's orders assured that Ford could not begin to have brand name success in the replacement market for at least ten to thirteen years." *Post*, at —. This conclusion distorts the effect of the District Court decree and the nature of the spark plug industry. Ford's own studies indicate that it would take five to eight years for it to develop a spark plug division internally. A major portion of this period would be devoted to the development of a viable position in the aftermarket. The five-year prohibition on the use of its own name and the 10-year limitation on its own manufacturing mesh neatly to allow Ford to establish itself in the *aftermarket* prior to becoming a manufacturer while, at the same time, giving Autolite the opportunity to re-establish itself by providing a market for its production. Thus, the District Court's decree delays for only two to five years the date on which Ford may become a manufacturer with an established share of the *aftermarket*. Given the normal five to eight year lead time on entry through internal expansion, the District Court's decree does not significantly lessen Ford's moderating influence as a potential entrant on the edge of the market. Moreover, in light of the interim benefits this ancillary relief will have on the re-establishment of Autolite as a viable competitor and of Ford as a major purchaser, we cannot agree with the characterization of the relief as "harshly restrictive," *post*, at —, or the assertion that the decree, in any practical and significant sense, "prohibit[s] Ford from entering the market through internal expansion." *Post*, at —.

Antitrust relief should unfetter a market from anticompetitive conduct and "pry open to competition a

market that has been closed by defendants' illegal restraints." *International Salt Co. v. United States, supra,* at 401. The temporary elimination of Ford as a manufacturer of spark plugs lowers a major barrier to entry to this industry. See C. Kaysen & D. Turner, Antitrust Policy—An Economic and Legal Analysis 116 (1959). Forces now at work in the marketplace may bring about a deconcentrated market structure and may weaken the onerous OE tie. The District Court concluded that the forces of competition must be nurtured to correct for Ford's illegal acquisition. We view its decree as a means to that end.[12]

The thorough and thoughtful way the District Court considered all aspects of this case, including the nature of the relief, is commendable. The drafting of such a decree involves predictions and assumptions concerning future economic and business events. Both public and private interests are involved; and we conclude that the District Court with a single eye to the requirements of § 7 and the violation that was clearly established made a reasonable judgment on the means needed to restore and encourage the competition adversely affected by the acquisition.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

[12] The District Court decree thus implements the congressional judgment in favor of atomized markets reflected in the Celler-Kefauver Anti-merger Act:

"But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision." *Brown Shoe Co.* v. *United States, supra,* at 344.

SUPREME COURT OF THE UNITED STATES

No. 70–113

Ford Motor Company, Appellant, v. United States et al. | On Appeal from the United States District Court for the Eastern District of Michigan.

[March 29, 1972]

MR. JUSTICE STEWART, concurring in the result.

The spark plug industry as it stood prior to Ford's acquisition of Autolite was hardly characterized by vigorous competition. For 25 years, the industry had consisted of AC, owned by and supplying original equipment (OE) plugs to General Motors; Champion, independent and supplying Ford; Autolite, independent and supplying Chrysler; and a number of small producers who had no OE sales and only a miniscule share of the aftermarket.[1] The habit among mechanics of installing replacement plugs carrying the same brand as the automobile's original plugs, reinforced by the unwillingness of service stations to stock more than two or three brands,[2] made possible the "OE tie," which rendered any large-scale entry into the aftermarket virtually impossible without first obtaining a large OE customer. Moreover, price competition was minimal, both in the OE market (where any reduction in the six-cent price would immediately be matched by rivals), and in the aftermarket (where spark plugs accounted for such a small percentage

[1] Both Champion and Autolite supplied original equipment plugs to American Motors, which in 1961 had roughly 5% of the domestic automobile market.

[2] According to a 1966 survey, only 11% of all metropolitan area service stations stocked any brand of spark plug other than Champion, AC, or Autolite, and only 30% stocked all three of the leading brands.

of the normal tuneup charge that price differentials did not have a significant impact upon consumer choice).

The District Court found that the acquisition of Autolite's spark plug assets by Ford further lessened competition in the industry in two ways: it forcelosed Ford as a potential purchaser of spark plugs from independent producers, and it eliminated what the District Court found to have been Ford's "moderating effect" upon Champion's pricing policies in the aftermarket. These findings standing alone might provide a basis for concluding that the acquisition violated § 7, but, as THE CHIEF JUSTICE demonstrates in his dissenting opinion, *post*, the remedy ordered will not restore the pre-acquisition market forces upon which the District Court focused. For, under the court's injunctions, Ford will be neither a potential market entrant, nor a potential purchaser of half its OE requirements from producers other than Autolite, for a substantial period of time after the divestiture takes place.

In my judgment, both the finding of a § 7 violation and the remedy ordered may be better rationalized in terms of probable future trends in the spark plug market, visible at the time of the acquisiton. The District Court observed that "a court cannot shut its eyes to contemporary or predictable factors conducive to change in the competitive structure." 286 F. Supp. 407, 442. This was a proper inquiry because we have held that § 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 362.[3]

[3] Ford argues that the acquisition allowed Autolite to compete more effectively against the two larger brands, Champion and AC. Since this argument is addressed to the effect of the acquisition upon *competition*, the Court obviously provides no answer to the argu-

The District Court found that the growth of service-centers operated by mass merchandisers carrying private label brands might eventually loosen the OE tie and the tight oligopoly in the spark plug market that it had fostered. Had Ford entered the market through internal expansion, either Champion or Autolite would have been left without an OE entry, but would nevertheless have owned an established brand name with an existing distribution system, together with a large production capacity. Even the threat of being so stranded, not to mention its realization, would have given both Champion and Autolite an incentive to compete as suppliers to private label sellers, as these sellers began to represent a significant share of the market, and to undermine the OE tie. Ford's acquisition of Autolite did more than foreclose it as a potential OE customer, or eliminate its "moderating effect" upon Champion's pricing policies: it eliminated one of the only two independent producers with a sufficient share of the aftermarket to give it a chance to compete effectively without an OE tie. Thus, the acquisition had the probable effect of indefinitely postponing the day when existing market forces could produce a measurable deconcentration in the market.

While the District Court did not justify the divestiture in precisely these terms, I think its prediction of future trends in the spark plug industry is an adequate basis to support the remedy ordered. The dissenting opinion,

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ment when it quotes *Philadelphia National Bank* for the proposition that arguments *unrelated* to the merger's effect upon *competition* are irrelevant in a § 7 case. But Ford's arguments that Autolite was a more effective competitor after the acquisiton rests principally on the fact that Autolite's market share increased after 1961 while Champion's decreased. This development, however, can be attributed for the most part to the fact that Autolite now provides original equipment plugs to Ford, rather than to the smaller Chrysler. Autolite's increased market share, therefore, is more likely attributable to the OE tie than to any increase in its competitive vigor.

post, is correct in its assertion that the ancillary injunctions are anti-competitive in the short run, and that the District Court took extraordinary measures to mother the divested producer for the next decade. But I cannot say that these injunctions are not reasonably calculated to establish the new Autolite producer as a viable firm and thus to restore the pre-acquisition market structure, insofar as it is now possible to do so. A divestiture decree without ancillary injunctions would not automatically restore the *status quo ante,* as the dissenting opinion seems to assume. The Electric Autolite Company, from which Ford acquired the assets in question here, will not be recreated by the divestiture, and it is reasonable to assume that a new owner of the Autolite trade name and the New Fostoria plant will require a period of time to become as effective a competitor as was Electric Autolite prior to the acquisition.

Though the economics of the market are such that the divestiture cannot be assured of success, it does at least have a chance of bringing increased competition to the spark plug industry. And while divestiture remedies in § 7 cases have not enjoyed spectacular success in the past, remedies short of divestiture have been uniformly unsuccessful in meeting the goals of the Act. See Elzinga, The Antimerger Law: Pyrrhic Victories, 12 J. Law & Econ. 43 (1969).

SUPREME COURT OF THE UNITED STATES

No. 70–113

Ford Motor Company, Appellant, *v.* United States et al.	On Appeal from the United States District Court for the Eastern District of Michigan.

[March 29, 1972]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

In addition to requiring divestiture of Autolite, the District Court made ancillary injunctive provisions that go far beyond any that have been cited to the Court. Ford is forbidden to manufacture spark plugs for 10 years; Ford is ordered to purchase one-half of its total annual requirement of spark plugs from the divested company under the "Autolite" name, and Ford is forbidden for the same period from using its own trade name on any spark plugs. These provisions are directed to prevent Ford from making an independent entry into the spark plug market and, in effect, to require it to subsidize Autolite for a period of time. Despite the draconian quality of this restriction on Ford, I can find no justification in the District Court's findings for this remedy. I dissent from the broad sweep of the District Court's remedial decree. I would remand for further consideration of the remedial aspects of this case.

An understanding of the District Court's findings as to the spark plug market shows three reasons why it was in error in requiring Ford to support Autolite. First, the court did *not* find that the weakness of an independent Autolite's competitive position resulted from Ford's acquisition. Rather, a reading of its findings

makes apparent that the precariousness of Autolite's expected post-divestment position results from pre-existing forces in the market. Therefore, the drastic measures employed to strengthen Autolite's position at Ford's expense cannot be justified as a remedy for any wrong done by Ford. Second, the remedy will perpetuate for a time the very evils upon which the District Court based a finding of an antitrust violation. Third, the court's own findings indicate that the remedy is not likely to secure Autolite's competitive position beyond the termination of the restrictions. Therefore there is no assurance that the judicial remedy will have the desired impact on long-run competition in the spark plug market.

The Court makes two critical errors in order to avoid the effect of this reasoning. It rejects the factfinding by the District Court in order to uphold its remedial order; and it repeats that court's error by discussing the assistance necessary to restore Autolite to the *status quo ante* without ever delineating that prior state of affairs or indicating how Ford, by acquiring Autolite and holding it for a number of years, had undermined its ability to reassume its former independent competitive position.

The District Court made extensive findings on the nature of the spark plug market. Some of these findings appear in the Court's opinion, but some factors which seem crucial to me are either omitted or not adequately set forth. Therefore I will sketch these findings at some risk of repetition.

Beyond doubt the spark plug market has been overwhelmingly dominated by three manufacturers for a long period: AC, owned by General Motors, which had about 30% of the market in 1961; Champion, which had supplied Ford since 1910 and had approximately 50% of the market in 1961; and Autolite, which had supplied

Chrysler since 1941 and had 15% of the market in 1961. Together these three companies among them had over 95% of the total market in 1961.

The reason for the continued domination of the market by the three big plug manufacturers is the pervasive feature of the plug market known as the "OE (original equipment) tie." This denominates the phenomenon that mechanics who replace spark plugs in a car engine have tended, almost exclusively, to use the brand of plug installed by the auto builder as original equipment. Though not required by spark plug technology, mechanics have followed this practice because of a strong desire to avoid any chance of injuring an engine by putting a mismatched plug into it. Further, because plugs are low profit items, those who install them tend to carry an inventory of a small number of brands. Most carry only two and some carry three brands, and they choose the brands installed by the big auto manufacturers as original equipment. Thus it takes a position as supplier to a large auto maker to gain recognition in the spark plug replacement market. The Government conceded in the District Court, for instance, that American Motors, with 5% of the auto market, would not be able to create market acceptance for an independent brand of plug by installing it as original equipment in its cars.

Because of the competitive importance of having their plugs installed as original equipment by one of the three auto companies, plug manufacturers have over a long period been willing to sell OE plugs for initial installation by auto manufacturers at a price below their production cost. The longstanding price for OE plugs, about 6 cents, is now approximately one-third of the cost of producing these plugs. Such below-cost selling is profitable for the plug companies because of the foothold it gives them in competing for the normal five or

six sets of replacement plugs necessary in the lifespan of an automobile. This pricing policy has been partially responsible for the semi-permanent relations between the plug manufacturers and the auto manufacturers: it is only those plug companies who profit from the OE tie over the long run who can afford this below-cost sale to the auto companies.

The strength of the OE tie is demonstrated by the inability of well-known auto supply manufacturers to gain a significant share of the spark plug market in the absence of an OE tie. As the District Court found, no company without the OE tie

> ". . . ever surpassed the 2% level. Several have come and gone. Firestone Tire and Rubber Company merchandised "Firestone" replacements for 35 years before it gave up in 1964. Although it owned some 800 accessory stores and successfully wholesaled other items to more than 50,000 shops and filling stations, it could not surmount the patent discrimination against brands not blessed with Detroit's approbation. Goodyear Tire and Rubber Company quit in only three years. Globe Union, a fabricator which had barely 1% of the nation's shipments, withdrew in 1960."

Two small manufacturers survive producing plugs for private label brands. Thus "Atlas" plugs, sponsored by Standard Oil, has 1.4% of the replacement market; "Prestolite" and Sears, Roebuck's "Allstate" each has 1.2%; and Montgomery Ward's "Riverside" label has .6% of the replacement market.

An independent entry into the plug market by Ford, with the expected substitution of its own plugs as original equipment in its cars, would have necessarily deprived one of the two significant independent plug producers of its OE status. The District Court found that,

because of the importance of the OE tie, the plug producer deprived of this support would most likely have lost any significant position in the market.[1] Autolite, with only 15% of the market before the acquisition, would certainly have lost any significant position in the market if an independent entry by Ford had led Chrysler to shift its patronage from Autolite to Champion. The District Court asserted that a Champion without OE status would have had some chance of maintaining a significant market position because of its size, although it gave no reason for thinking Champion's size immunized it from dependence on OE status. Before 1961, Champion had just under 50% of the market. As a result of Champion's move to Chrysler in 1961, its position in the market dropped to 33% by 1966. The District Court found no basis for predicting which of the two big independents would have won such a competition for continued OE status.

Thus an independent entry by Ford would not likely have increased the number of significant competitors in the spark plug market. Rather it would simply have substituted Ford for one of the two significant independent manufacturers. The result of this expectation is that the District Court did not base its finding of illegality on the ground typically present when a potential entrant enters an ologopolistic market by acquisition rather than internal expansion, *i. e.*, that such a move has deprived the market of the pro-competitive effect of an increase in the number of competitors. Here an independent entry would not have increased the number of competitors but simply would have exchanged one com-

[1] Of course the decline would take a number of years, since it would be spread over the life of the cars on the road bearing the producer's plugs as original equipment—probably five to eight years.

petitor for another. In noting this paradoxical fact, the District Court concluded that "Ford may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication." [2]

Not finding that Ford's entry by acquisition had deprived the spark plug market of any pro-competitive effect of an independent entry, the District Court relied on two other grounds for finding a violation of the antitrust laws. First, it concluded that as a potential entrant on the edge of the market who was also a major purchaser in the market, Ford exercised a "moderating" influence on the market; the second basis for determining the acquisition illegal was the finding that the acquisition "foreclosed" other companies from competing for the business of supplying Ford with spark plugs.

With respect to Autolite itself, the District Court made several relevant findings. First, it found that Autolite is a fixed-production plant. In other words, it can be profitable only turning out approximately the number of plugs it now manufactures. It could not, for instance, reduce its production by half and sell that at

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[2] MR. JUSTICE STEWART, concurring in the result, relies on factual assumptions that seem to me directly contrary to findings made by the District Court. While that court found future developments might arise in the plug market that would enable an independent Autolite without OE status to survive, it also found that an independent entry by Ford in 1960, or even as of the date of the projected divestiture, would have left Autolite doomed because the market would not yet be ready to offer it an independent niche. By slighting these findings, MR. JUSTICE STEWART is able to avoid the question whether Ford should have to bear the burden of maintaining Autolite's life until a time when market changes might support it when it is clear that an earlier independent entry by Ford would have left it moribund. He further overlooks the problems discussed below as to the unlikelihood of Autolite's success, its fixed-production needs versus the small size of the market free of the OE tie.

a profit. Second, it made extensive findings with respect to Autolite's distribution system:

> "Ford received six regional offices, personnel, and a list of Electric Autolite's warehouses and jobbers. All of these have been and still are at liberty to deal with anyone they wish. Each old direct account had to be visited individually and, if it consented, be resigned by defendant [Ford]. Within a few months, 52 did enter into new ignition contracts. However, 50 of these for the previous year had also been . . . [distributors of other Ford products]. By mid-1966, direct accounts totaled 156, of which 104 in 1960 had been pledged to neither Ford nor Autolite. The same block of 50 had been committed to both. The net increase traceable with any semblance of accuracy to the acquisition is two first-layer middlemen . . . ."

As to difficulties that a divested Autolite might have in establishing an independent distribution system, the District Court mentioned only one:[3] if Ford were to offer its own plugs to its car dealers at a fairly low price, one which independent jobbers could not meet, Autolite would have difficulty independently establishing its distribution system. The jobbers would be less interested in handling Autolite's line since the Ford dealers would not want Autolite at the jobbers' price and, with this demand cut out, the jobbers would be less interested in pushing Autolite generally.

There is another set of relevant facts found by the District Court. The District Judge found that "there

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[3] The District Court made no mention of whether a divested Autolite would have the six regional offices and personnel that it had in 1960. Given the District Court's solicitude for Autolite's health, I can only assume that it expected Autolite to be sent out with whatever it had brought in.

is a rising wind of new forces in the spark plug market which may change it." On the basis of the testimony of an executive of one of the producers of plugs for private labels, the court found that the private brand sector would grow during the next 10 years. This highly speculative observation of the District Court was based on a finding that the mass merchandisers are beginning to enter the plug marketing field in force. Not only do the mass merchandisers market private brand plugs over the counter, but they are also building service bays. And in these bays many carry only their own proprietary brand of spark plugs. This witness predicted that the mass merchandisers would increase their share of the aftermarket from 4.4% to 10% by 1980. He further predicted that oil companies would enter the replacement market, resulting in a total of 17% of the replacement market being supplied by private label plugs by 1980. The court concluded that these forces "may well lead to [the market's] eventual deconcentration by increasing the number of potential customers for a new entrant into the plug manufacturing business and reducing the need for original equipment identification."

In its separate opinion on remedies, the District Court correctly stated the relevant law; the purpose, and limit of antitrust remedies, is to

> . . . free these forces [within the market] from the unlawful restraint imposed upon them so that they may run their natural course.

The violators may not be required to do more than return the market to the *status quo ante*. See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 152–153 (1948); *FTC* v. *Reynolds Metals Co.*, 309 F. 2d 223 (DC 1962) (Burger, J.). Applying this general provision

to the instant situation, the District Court correctly stated

> "The court wishes to note here that although it finds that divestiture is the only effective remedy, it does not agree with the Government that the remedy should be affirmatively designed to 'break the OE tie.' The remedy is designed to correct the violations of Section 7 found by the court. The OE tie, as such, does not violate Section 7."

The District Court then concluded that, in addition to divestiture of the Autolite plant and trade name, certain injunctive provisions were required "to give [Autolite] an opportunity to establish its competitive position." It therefore ordered that Ford be prohibited from manufacturing spark plugs for a period of 10 years. It further ordered that for a period of five years Ford would be *required* to purchase one-half of its total annual requirements of spark plugs from Autolite, bearing the Autolite label. For this five-year period Ford was also ordered not to use or market a spark plug under a trade name owned by or licensed to it. The effect of these orders was two-fold. They assured Autolite of a purchaser for a large part of its production for five years. And they prevented Ford from immediately entering the competition for a share of the aftermarket with a plug under its own name; it could not even label a plug under its own name for five years and could not manufacture its own plug for 10 years. Given the findings of the court that even with the status of supplier of original equipment (with the company's own brand name on plugs) to a major auto manufacturer it would take a new entrant into the spark plug market five to eight years to establish a position for its brand in the replacement market, the District Court's orders assured that Ford could not begin to have brand name

success in the replacement market for at least 10 to 13 years.[4]

In my view these drastic remedial provisions are not warranted by the court's findings as to the grounds on which Ford's acquisition violated the antitrust laws. Further, in light of the District Court's own fact findings, these remedies will have short run anti-competitive impact and they give no assurance that they will succeed in allowing Autolite to establish its competitive position.

The remedial provisions are unrelated to restoring the *status quo ante* with respect to the two violations found by the District Court, the ending of Ford's status as a potential entrant with a moderating influence on the market and the foreclosure of a significant part of the plug market. Indeed, the remedies may well be anti-competitive in both respects. First, the District Court's order actually undercuts the moderating influence of Ford's position on the edge of the market. It is the possibility that a company on the sidelines will enter a market through internal expansion that has a moderating influence on the market. By prohibiting Ford from entering the market through internal expansion, therefore, the remedy order wipes out, for the duration of the restriction, the pro-competitive influence Ford had on the market prior to its acquisition of Autolite. Second, the

[4] The majority opinion errs in its evaluation, *supra*, at ——, of the effect of the restrictions on Ford's ability to establish itself in the aftermarket. The District Court opinion makes clear that gaining a position in the replacement market takes five to eight years after the brand of plugs is first installed as original equipment: 18 months to three years before the first cars need plug replacements plus several annual car populations requiring this brand before service centers would be motivated to stock it. Thus the prohibition of Ford using its own name for five years delays the beginning of an independent Ford entry and results in assuring that Ford could not gain a position in the aftermarket for 10 to 13 years after the effective date of the divestiture.

Court's order does not fully undo the foreclosure effect of the acquisition. Divestment alone would return the parties to the *status quo ante*. Ford would then be free to deal with Autolite or another plug producer or to enter the market through internal expansion. Yet the Court has ordered Ford to buy at least half its requirements from Autolite for five years. Thus the order itself forecloses part of Ford's needs from the forces of competition.

The above problems might be minor if the District Court's remedy were justifiable in terms of returning Autolite to the *status quo ante* by overcoming some harm to its ability to compete accomplished by Ford's acquisition. But on this issue the District Court opinion and the majority of this Court are confused. Although the District Court asserted that Autolite needed the aid of its injunctive remedies to establish its competitive position, the court made no findings in its Remedy Opinion as to the source of Autolite's competitive weakness. Therefore it never reached the issue whether the source of weakness had anything to do with the violations attributed to Ford. Instead, the court's opinion proceeded from the recognition of competitive problems immediately to the prescription of a remedy.

In fact a fair reading of the findings of the District Court shows that the acquisition did not injure Autolite's competitive position. Autolite's OE status was continued and its share of the aftermarket was increased from 12.5% to 19%. Thus its trademark is at least as strong now as when Ford acquired the company. Nor did the acquisition and holding of Autolite injure its distribution system. The District Court found that Autolite did not own a distribution system. It merely had short-term contracts with jobbers who distributed its plugs to those who install them in cars or sell them to the public. Almost all of these jobbers had concurrent

distribution relations with Ford. In fact, between 1961 and 1966 Ford *tripled* the number of jobbers handling Autolite plugs. From the opinion below, it appears that Ford has done nothing that will prevent an independent Autolite from seeking to maintain these distribution channels. The only possible finding of injury to be squeezed out of the acquisition relates to the fact that Autolite has been shorn of its status as OE supplier of Chrysler. But this is inconclusive. Autolite had nothing more in its position as OE supplier to Chrysler than it would if Ford voluntarily chose to use Autolite plugs after the divestment: a relationship based on short-term contracts the auto manufacturer could refuse to renew at any time.

The findings of the District Court indicate that Autolite's precarious position did not result from its acquisition by Ford. Prior to the acquisition both Champion and Autolite were in a continually precarious position in that their continued large share of the market was totally dependent on their positions as OE suppliers to auto manufacturers. The very factor that assured that they faced no serious competition in the short run also assured that in the long run their own position was dependent on their relationship with a large auto manufacturer. Thus the threat to Autolite posed by a simple divestiture is the same threat it had lived with between 1941 and 1961 as an independent entity: it might be left without any OE supply relationship with a major auto manufacturer, and therefore its market position based on this relationship might decline drastically.

Today's opinion errs when it states, *supra,* at ——, that the District Judge found the OE tie the "key to the solution" of this problem. Athough the court indeed found this tie a pervasive factor in the market, it also found that the phenomenon was not created by Ford and that it did not constitute a § 7 violation. Therefore

the Court errs in justifying the ancillary remedies as necessary to overcome the OE tie. Even if such a remedy might overcome the OE tie, which I question, there is no justification for burdening *Ford* with the restrictive order.

Further, the only conclusion to be drawn from the trial findings is that the remedy is unlikely to result in a secure market position for Autolite at the end of the restricted period. Once again it will be dependent for its survival on whether it can maintain an OE supply status. The District Court's suggestion that Autolite can find a niche supplying private brand labels is unpersuasive. It cannot be predicted with any certainty that these sales outlets will grow to the extent predicted by one person in that line of the business. Further, even if they do, this is no assurance of Autolite's survival. There are already several companies in the business of producing plugs for private labels. Autolite will have to compete with them. The results will not be helpful. One possibility is that Autolite would completely monopolize the private brand market to the extent of about 17% of the replacement market. This is as uncompetitive as it is unlikely. The more reasonable likelihood is that Autolite might be able to gain a position producing, for instance, 5% of the replacement market plugs. But this would be useless because the District Court's findings make clear that Autolite's fixed-production plant cannot supply such a small share of the market at a profit.

In the final analysis it appears to me that the District Court, seeing the immediate precariousness of Autolite's position as a divested entity, designed remedies to support Autolite without contemplating whether it was equitable to restrict Ford's freedom of action for these purposes or whether there was any real chance of Autolite's eventual survival. I fear that this is a situation

where the form of preserving competition has taken precedence over an understanding of the realities of the particular market. Therefore I dissent from today's affirmance of the District Court's harshly restrictive remedial provisions.[5]

[5] This case illustrates the unsoundness of the direct appeal permitted in cases of this kind under 15 U. S. C. § 29. In a factually complicated case like this, we would be immeasurably aided by the screening process provided by a Court of Appeals review. Limited expediting of such cases, under the discretion of this Court, would satisfy all needs justifying direct review in this Court.

SUPREME COURT OF THE UNITED STATES

No. 70–113

Ford Motor Company, Appellant, *v.* United States et al.	On Appeal from the United States District Court for the Eastern District of Michigan.

[March 29, 1972]

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I concur in Part I of the Court's opinion and in that portion of Part II which approves divestiture as part of the remedy. I cannot agree, however, that prohibiting Ford from using its own name or its trade name on any spark plugs for five years and enjoining it entirely from manufacturing plugs for 10 years is just, equitable or necessary. Instead, the stringency of those remedial provisions strikes me as confiscatory and punitive. The Court's opinion, *ante,* p. 3, recognizes that Ford could develop its own spark plug division internally and place itself in the same position General Motors has occupied for so long, but that this would take from five to eight years. The restraint on Ford's entering the spark plug area is thus for a period longer than it would take Ford to achieve a position in the market through internal development. And to deny it the use of its own name is to deny it a property right that has little to do with this litigation.